90-1716

Supreme Court, U.S.
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No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

IOWA DISTRICT COURT FOR WINNESHIEK COUNTY,

Petitioners,

vs.

STATE OF IOWA,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the
SUPREME COURT OF IOWA

EGGERT, ERB, OTT, O'DONOHOE & FRYE

By: Judith O'Donohoe
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ATTORNEY FOR THE PETITIONER

QUESTIONS PRESENTED

Whether the action of the Iowa Supreme court in remanding a criminal case for retrial following a finding of guilt by the Trial Court to a lesser included offense, violates the Defendant's Constitutional protection under the Fifth Amendment to protection against double jeopardy?

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The Petitioner, the Iowa District Court for Winneshiek County, respectfully prays that a Writ of

Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Iowa made in this proceeding issued December 19, 1990 and the denial of the Petition for Rehearing issued January 24, 1991.

OPINION BELOW

The opinion of the Supreme Court of the State of Iowa is reported at 464 N.W. 2nd 223 (Iowa 1990), and is printed in Appendix B, App. 30, infra. The December 14, 1989 pertinent proceedings and order of the Iowa District Court for Winneshiek County is unreported but may be found in Appendix A at App. p. 1, Infra.

JURISDICTION

The judgement of the Iowa Supreme Court was entered on December 19, 1990. A timely Petition for Rehearing was denied on January 24, 1991 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3) in that the validity of the judicial exception to Section 816.3 (3) of the Iowa Code is repugnant to the accused protection against double jeopardy granted by the Fifth Amendment to the United States Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment V:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

Iowa Code: Section 816.2

816.2 **Prosecutions barred.** When a defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the same offense charged in the former or for any lower degree of the offense, or for an offense necessarily included therein.

Iowa Code: Section 816.3

816.3 **Exceptions -- limitation.** A prosecution is not barred:

1. By a former prosecution before a court which lacked jurisdiction over the defendant or the offense.

2. By a former prosecution procured by the defendant without the knowledge of a prosecuting officer authorized to commence a prosecution for the maximum

offense which might have been charged on the facts known to the defendant, and with the purpose of avoiding the sentence which otherwise might be imposed.

3. If subsequent proceedings resulted in the invalidation, setting aside, reversal or vacating of the conviction, unless the defendant was adjudged not guilty; but in no case where a conviction of a lesser included crime has been invalidated, set aside, reversed or vacated shall the defendant be subsequently prosecuted for a higher degree of the crime for which the defendant was originally convicted.

STATEMENT OF THE CASE

On September 1, 1989 the State of Iowa by the Winneshiek County Attorney, Dale L. Putnam filed a trial information against the Defendant Michel Dean Gulrud on two counts. The first count was for obstructing justice, a Class D Felony committed as follows: "on or about the 31st day of August, 1989, in the County of Winneshiek, in the State of Iowa, the Defendant, Michel Dean Gulrud did unlawfully and willfully furnish or knowingly make available a controlled substance to an inmate at the detention facility, to wit: the Winneshiek County Jail, all in violation of Section 719.8 of the Iowa Criminal Code." Count Two alleged the same offense committed as follows: "that on or about the 31st day of August, 1989, in the County of Winneshiek in the State of Iowa,

Defendant, Michel Dean Gulrud did unlawfully and willfully introduce a controlled substance into the premises of the Winneshiek County Jail, in violation of Section 719.8 of the Iowa Criminal Code. Trial was set in this matter for December 14, 1989 and the Defendant waived his right to a jury trial both in writing and on the record before the Honorable Judge William G. Klotzbach. The trial opened with the County Attorney reading the trial information. Both parties made opening statements and the Court then inquired as to whether any factual stipulations could be made. The Court first asked if the parties would stipulate that Mr. Gulrud was confined to the Winneshiek County Jail; this was agreed to; then the Court asked if the Defendant would stipulate that the

Winneshiek County Jail is a "detention facility." The Defendant, by his attorney, refused to stipulate to this point. The Court then heard legal argument on the question. App. A at App. 1, Infra. It ruled that the term "detention facility" in Section 719.8 did not apply to "county jails" but only "county detention facilities, a correctional institution or an institution under the control of the Iowa Department of Corrections." The Court further indicated that it believed there were some lesser included offenses still remaining under the trial information, in spite of the inapplicability of Section 719.8 of the Iowa Criminal Code to county jails. App. A at App. 8 and 9. The Court indicated off the record that the Defendant could proceed with trial or enter a plea to

the highest lesser included offense. The Defendant decided to enter a plea. The Court then took the proffered plea of the Defendant to the charge of possession with intent to deliver contrary to Section 204.402, which was an accommodation under Section 204.410 of the Iowa Criminal Code. App. A at App. 13-18.

The County Attorney resisted the Court's action in allowing the plea to the lesser included offense. App. A. at App. 12. But he did agree that the plea was properly taken and that the amount of marijuana involved was less than an ounce. App. A at App. 13 and 17.

Following the plea proceeding, the County Attorney presented evidence in an offer of proof through the Winneshiek County Deputy Sheriff, Floyd Ashbacher. App. A at App. 21-25. The evidence demonstrated that the county jail was under the

control of the County Sheriff and was funded through the County Sheriff's budget.

The Court then advised the Defendant of his right to file a motion in arrest of judgment within 45 days to challenge the adequacy of the plea. App. A at App.27.

The Defendant filed no motion for in arrest of judgment however, the Winneshiek County Attorney filed a Writ of Certiorari on January 8, 1990, alleging that the Iowa District Court exceeded its jurisdiction and authority by taking the Defendant's plea to possession with intent to deliver over his objection.

The Iowa Supreme Court issued a preliminary finding that the District Court may have exceeded its jurisdiction in accepting the plea and ordered that

the matter be reviewed for final determination.

On December 19, 1990, the Iowa Supreme Court issued its ruling sustaining the Writ and ordering the case to be remanded for trial on the original charge under Section 719.8 of the Iowa Code, with the clarification that a "detention facility" also includes a "county jail". The Court also determined that the prohibition against retrying a defendant on any offense higher than the lesser included offense for which he was found guilty, as set forth in Section 816.3 (3) of the Code, did not apply because the Defendant entered a guilty plea to the lesser included offense rather than being found guilty by the Trial Court on the lesser included offense. The retrial of the Defendant in the Iowa

District Court for Winneshiek County on the original charge is imminent. The Defendant and the District Court Judge, William G. Klotzbach, are requesting that this Court review the decision and determine that the State's Supreme Court's interpretation of Section 816.3 (3) of the Iowa Code is in violation of the accused protection against double jeopardy.

HOW FEDERAL QUESTION IS PRESENTED

The Federal question is presented by reason of the fact that the decision of the Iowa Supreme Court violated the fifth amendment right of the accused not to be put twice in jeopardy of life or a limb on the same offense.

REASONS FOR GRANTING THE WRIT

A. The accused protection against double jeopardy has been violated by the decision of the Iowa Supreme Court.

At the insistence of the Trial Court upon its finding that one of the elements of the criminal offense of furnishing controlled substance to inmate, i.e., that the offense was committed in a "detention facility", was lacking directed the defendant to proceed with the trial of lesser included offenses or in the alternative, enter a guilty plea to the most serious of the lesser included offenses. Under this pressure, the accused, Michel Dean Gulrud decided to enter a plea of guilty. The lesser included offenses facing the accused, following the Court ruling that a county jail was not a

"county detention facility" within the meaning of Section 719.8 of Iowa Code were 1) possession of a controlled substance with intent to deliver, pursuant to Section 204.401 (1) of the Code of Iowa and 2) unlawful possession of a controlled substance pursuant to Section 204.401 (3) of the Code of Iowa. Both offenses due to the fact that the amount of marijuana involved was less than one ounce, carried the same penalty under the Iowa Law.

Following the entry of the plea, by the accused, the county prosecutor for Winneshiek County brought a Writ of Certiorari to the Iowa Supreme Court requesting a decision on the legal point of whether a "county jail" was included within the definition of a "detention facility" in construing Section 719.8 of the Code of Iowa.

The Respondent-Appellee, Iowa District Court for Winneshiek County argued this statutory construction question and also that any remand of the case for further proceedings would necessarily prohibit Michel Dean Gulrud's re-trial for any offense more serious than the offense of which he was found guilty, possession with intent to deliver.

The Iowa Supreme Court found that the accused had entered a plea of guilty to a lesser included offense of Section 719.8 and that ordinarily the protection afforded the accused by virtue of Section 816.3 (3) of the Iowa Code and the 5th amendment to the United States Constitution would prohibit any conviction for a higher offense on retrial. However, the Iowa Supreme Court went on to hold that pursuant to Section 816.3 (2), State vs. Bartlet,

181 Iowa 436, 164 NW 2nd 754 (1917) and its recently decided case, State vs. Iowa District Court for Jackson County, 463 NW2nd 885 (Iowa 1990), the accused had no double jeopardy protection because he had somehow solicited these proceedings over the objection of the County Prosecutor. Rarely, in the annals of judicial decisions has such a patently irrational and unjust conclusion been reached.

Section 816.3(3) specifically states that if a conviction for a lesser included crime has been invalidated, set aside, reversed or vacated, the defendant shall in no event be subsequently prosecuted for a higher degree of the crime for which the defendant was originally convicted. Section 816.3(2) does allow re-trial of a defendant for the maximum offense if he has without knowledge of the

prosecuting officer, procured a finding of guilt on a lesser charge. This appears to be a codification of the rule of the case of State vs. Bartlet, Supra, in this case, a defendant committed an aggravated assault and then ran to the Justice of the Peace and without any knowledge or consent of the prosecuting attorney, confessed to a simple assault and asked to be found guilty and sentenced. The Justice of the Peace obliged and the Prosecuting Attorney asked to set aside the finding of guilt on the simple assault in order to allow further prosecution on the aggravated assault charge. The Iowa Supreme Court specifically found that since the first finding of guilt was procured by the defendant without the knowledge of the Prosecuting Attorney, that double

jeopardy did not apply. State vs. District Court for Jackson County, 463 NW2d 885(Iowa 1990) involved a case where the District Court in the process of accepting a plea of guilty to the charge brought by the County Attorney, suggested that the parties enter into a plea bargain for a lesser offense. The Prosecuting Attorney objected and the defendant agreed. The Court then went forward to take the plea over the objection of the County Attorney. The higher offense charged was not found inapplicable or inappropriate.

The facts of the instant case are entirely dissimilar to any of these authorities cited by the Iowa Supreme Court. In fact, Iowa Rule of Criminal Procedure 6.(1) specifically requires a Prosecuting Attorney to charge the highest offense of which he believes the

defendant to be guilty and prohibits any listing in the trial information of public offenses which are lesser included. Iowa Rule of Criminal Procedure 6.(3) states that "in a case where the public offense charged may include some lesser offenses, it is the duty of the Trial Court to instruct the jury, not only as to the public offense charged, but as to all lesser offenses of which the accused might be found guilty under the indictment and upon evidence adduced, even though such instructions have not been requested." An additional rule, Iowa Rule of Criminal Procedure 21.3 states "upon trial of an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree

inferior thereto or of an attempt to commit the offense when such an attempt is prohibited by law. In all cases, the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which the defendant is charged." In addition to these rules of criminal procedure the Iowa case law clearly supports the proposition that the Court is duty bound to submit lesser included offenses if appropriate and this duty does not require any acquiescence from the prosecuting attorney or involve the decision making power of the County Attorney. State vs. Willis, 250 NW2d 428 (Iowa 1977); State vs. Sangster, 299 NW2d 661 (Iowa 1980); State vs. Lux, 315 NW2d 859 (Iowa App. 1981).

The Iowa Supreme Court clearly found that the defendant had entered a

plea of guilty to the lesser included offense following the decision of the Trial Judge that one of the elements of the higher offense could not be proven as a matter of law by the County Prosecutor. The defendant clearly had to either proceed with the defense on the lesser included offense or enter a plea thereto. The Iowa Supreme Court offers no justification for finding tha the accused, Michel Dean Gulrud, should be deprived of his constitutional protection against double jeopardy because he entered a plea rather than allowing the Trial Court to make a finding of guilt based on further evidence presented by the County Attorney. On the final page of its decision in the first full paragraph,

the Court indicates that by entering this plea, the defendant has somehow consented and participated in the proceedings and this is a constructive waiver of his double jeopardy protection. It should be noted that there are no case citations for this proposition. The Federal Courts have dealt with the question of waiver of double jeopardy protection in the context of whether a re-trial after a mistrial is in violation of the double jeopardy protection. In United States ex rel. Lovinger v. Circuit Court for the 19th Judicial Circuit, Lake County, Illinois, 652 F. Supp. 1336 (N.D. Ill. 1987), the Court dealt with the concept of waiver. In evaluating this question the Court looked at the defendants conduct to determine if he himself was requesting the mistrial or by his conduct, inviting such a mistrial. If

the same principles are applied to the case of the entry of the guilty plea by the accused, in this case, Michel Dean Gulrud, it is clear that he did not voluntarily solicit the opportunity to enter a guilty plea to a lesser included offense. The Court made its own determination as to the lack of proof on an essential element for the higher offense and then required either a continued trial or a plea.

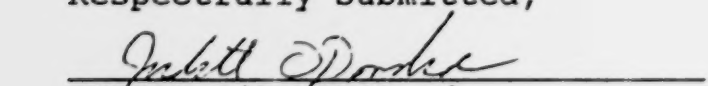
The Petitioner is aware that the United States Supreme Court is burdened with many issues of vital concern to the national judicial system as a whole. While the issue presented by this Writ of Certiorari is not novel and the course of justice will not be drastically altered by this small injustice that has been done to the accused, Michel Dean Gulrud, this Court should consider whether it is in the

best interest of our national system of justice to allow the Supreme Court of a state to trample on the rights of an accused and produce an opinion which provides no rational or justification for that act.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of Iowa.

Respectfully Submitted,



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PROOF OF SERVICE

I hereby certify that I caused three copies of this Petition for Writ of Certiorari to be served on counsel for the Respondent by first class mail, postage prepaid, at the following addresses:

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I further certify that on this 7th day of May, 1991, I served three copies of this corrected Writ of Certiorari to be served on the above counsel.

JUDITH O'DONOHOE

APPENDIX "A"

Even though we waived of the jury I think we begin the trial by reading the trial information.

MR. PUTNAM: All right. The defendant, Michael Dean Gulrud is charged by the State of Iowa in Two counts: Count one, obstructing justice, a class D. felony committed as follows: That on or about the 31st day of August, 1989, in the County of Winneshiek and State of Iowa the defendant, Michael Dean Gulrud did unlawfully and willfully furnish or knowingly make available a controlled substance to an inmate at a detention facility, to wit, the Winneshiek County Jail, in violation of Section 719.8 of the Iowa criminal Code.

Count two, obstructing justice, a class D felony committed as follows: That on or about the 31st day of August,

1989, in the County of Winneshiek and State of Iowa the defendant, Michael Dean Gulrud did unlawfully and willfully introduce a controlled substance into the premises of the Winneshiek County Jail in violation of Section 719.8 of the Iowa Criminal Code. To both counts the defendant has pled not guilty.

THE COURT: Okay. Would you care to make an opening statement at this time?

MR. PUTNAM: Very briefly, you Honor, the evidence is going to show that the defendant had been convicted of operating while intoxicated, and on August 4, 1989, on top of that he was placed on probation and received a partially suspended sentence. On August 4, 1989, the defendant was found in contempt of the Court's previous order on the OWI conviction and was sentenced

to serve seven days in the Winneshiek County Jail. He was given 30 days to serve the seven days. He was also, due to a subsequent order of August 11, 1989, granted work release for Monday, Tuesday, Wednesday and Thursday from 8:15 a.m. to 8:45 p.m. The defendant began serving the sentence towards the end of August.

On August 31 the defendant was released on work release and returned to the Winneshiek County Jail, and when he came in he had concealed marijuana in a plastic baggie. He brought the marijuana into the jail, went into the stool, rest room area, and retrieved the marijuana. Hen then offered the marijuana to one or more of the inmates at the Winneshiek County Jail. It was declined. The defendant then talked a little longer, ultimately went to bed.

On of the matrons was made aware of the possibility of marijuana in the Winneshiek County Jail and a search was conducted at approximately 7:00 a.m. on September 1, 1989. The defendant was asleep at the time the search was initiated. He was removed, as were all the other inmates, and placed in a bullpen holding area. And when the search was conducted of the defendant's bed the marijuana was found.

I believe that's what the evidence will show, your Honor, and accordingly at the end of all the evidence we will ask for a conviction on both counts for bringing the marijuana into the jail and a separate count of offering it to another inmate.

THE COURT: All right, and does the defendant wish to make an opening statement?

MS. O'DONOHOE: Yes, your Honor, I believe the only actual fact that will be presented to this Court is that a baggie with some small amount of marijuana was found in the general area of the bunk and bed covers of the defendant. That is the only fact I think that the State can reasonably show in this case.

They're relying chiefly on testimony by a fellow inmate by the name of Mr. Stamper, who was a previous felon, has made a number of inconsistent statements about this fact, and also at least apparently received concessions in a plea bargain on his own case arising out of this situation.

I believe that there's no question that there is a reasonable doubt here: A, that this particular defendant brought this into the jail; and, B, that

he furnished it or made a available to any other inmate. As a matter of fact, urinalyses were done on all of the inmates and they all turned up with no evidence of any drug usage, including marijuana. Further, Mr. Stamper has indicated that he saw the defendant retrieve marijuana from inside the jail cell. And I don't think even if you believe Mr. Stamper, which is very questionable, that that demonstrates that it was actually introduced into the facility by the defendant.

Also, I don't think there is any real evidence that it was furnished to anybody regardless, even if you believe Mr. Stamper's statement, no one utilized it and it was a very small amount.

THE COURT: Now, if I understand you correctly, then maybe we can have certain stipulations at this time. The

first element is there would be a stipulation that Mr. Gulrud, the defendant, was confined in the Winneshiek County Jail. Can we stipulate to that?

MS. O'DONOHOE: Yes, we can, your Honor.

THE COURT: All right. So stipulated. Number two, would you stipulate that the Winneshiek County Jail is a detention facility?

MS. O'DONOHOE: No, we will not, your Honor.

THE COURT: A correctional institution?

MS. O'DONOHOE: No, your Honor.

THE COURT: Or an institution -- well, then we've got a problem right there.

MS. O'DONOHOE: Right.

THE COURT: And that's why I read

the statute before we got into this. I thought we might have a legal problem right there.

MS. O'DONOHOE: No, we're not conceding that point, you Honor. As a matter of fact, we would argue that the court jail is not. I have some code citations if you are interested in them.

THE COURT: Yeah, well, that's when I read the statute here and opened the book up I thought we might have a problem as I read it, and that's the reason I wanted to know because I think we have a legal question beginning right off and bat --

MS. O'DONOHOE: Right.

THE COURT: -- a question here.

MS. O'DONOHOE: Okay. I think that jails are defined in Chapter 356 as jails, and under this --

THE COURT: Let me catch up with you here so we don't waste time. 356.

MS. O'DONOHOE: Could I have just a moment, your Honor?

MR. PUTNAM: I'll get another code.

THE COURT: Code annotated, is that it?

MR. PUTNAM: This is not --

MS O'DONOHOE: I don't -- I don't have it either.

MR. PUTNAM: -- the correct one.

THE COURT: That's gone, oddly enough, 719.8.

MR. PUTNAM: Oh, I've got that.

MS. O'DONOHOE: There is no annotations. There is no cases.

MR. PUTNAM: There is absolutely no cases under that part.

MS. O'DONOHOE: I guess maybe could I make my argument and then you decide what you want to do. There are three

parts to the argument.

THE COURT: Okay.

MS. O'DONOHOE: I guess what I am saying is I think there is a statutory intent to distinguish between jails and municipal facilities between correctional facilities under the jurisdiction of the Iowa Department of Corrections, and between detention facility, which are called county detention facilitys. And the three chapters they're referring to are 356, which involves jails, 246, that involves the correctional facilities that are unde the jurisdiction of the Iowa Department of Corrections, and 356A which speaks to county detention facilities.

And it would be our argument that the detention facility relates to these county detention facilities. The correctional institution or institution

under the management of the Iowa Department of Corrections would be those institutions listed in 246. And that actually what the defendant -- the institution the defendant was incarcerated in was a jail under Chapter 356. I'd also refer you to the Michigan law that has a similar type statute that I think has been construed to be related only to prisons and not to necessarily to county jails.

THE COURT: Okay. Mr. Putnam.

MR. PUTNAM: Well, Section 356.1, which deals with the jail, indicates that a jail is used, the paragraph, the whole subsection, Subsection 1, for the detention of persons charged with an offense; Subsection 2, for the detentions of persons who may be committed to secure their attendance as witnesses, et cetera. Clearly, 356.1

makes a jail a detention facility. And that's exactly what the jury instructions go to and that is what the charge is, a detention facility. And I believe we have just charged in a detention facility, your Honor. We haven't alleged a correctional institution or an institution under the management of the Iowa Department of Corrections. But the case -- there are no cases that state that a jail is not a detention facility, and that would be clearly -- clearly contrary to Section 356 which indicates that a jail is a detention facility.

The overall charge of obstructing justice would not -- the legislative intent to say this doesn't apply to jails where people are held, when clearly the code provides that a person can be placed and incarcerated in a jail

for a one-year period, to say that this only applies if you are placed in prison would not correspond with the definition in the part of the charge that indicates a detention facility. "Facility." If the legislators only wanted it to apply to a prison situation they would have indicated correctional institution. A detention facility, a jail is nothing more than a detention facility for an inmate.

MS. O'DONOHOE: However, your Honor, I think --

THE COURT: Wait a minute, I'll just -- it would be my ruling that the Winneshiek County jail is not a detention facility. Chapter 356A very plainly says the county detention facility, provides for the board of supervisors in lieu of or in addition to

the county jail, establish rules and regulations for the operation of a detention facility. The statute did not cover -- the legislature would have known that the statute was there. If they wanted to cover it with jails they could have said "jails" while a detention facility is very specifically provided for. Now, that doesn't mean that I will dismiss. I'm sure that the charge here -- there must be another charge that covers this situation --

MS. O'DONOHOE: Your Honor.

THE COURT: -- a lesser included.

MS. O'DONOHOE: That was my argument. 356A says detention facility and they could have said it right here.

THE COURT: There is no question about it.

MS. O'DONOHOE: It doesn't say jail and jails are a separate section.

THE COURT: Plain meaning.

MS. O'DONOHOE: Right.

THE COURT: So I would say, I don't know whether there is a lesser included or not.

MS. O'DONOHOE: Actually, I believe there is.

THE COURT: Well, I'm sure there is because I've tried them.

MR. PUTNAM: Your Honor, could I ask for a 15-minute recess at this point?

THE COURT: Yes.

MR. PUTNAM: I mean, this is the first time this has been raised. It wasn't raised by way of a motion to dismiss.

THE COURT: No, no, I looked --

MS. O'DONOHOE: You Honor, after I got into this --

THE COURT: Well, we can be off of

the record. Go ahead.

MS. O'DONOHOE: I got into this later and I am not foreclosed from raising it. I'm not the first attorney to represent Mr. Gulrud. I'm the second.

THE COURT: No, I read the statute and thought there was a problem right away before we got into the thing. I wanted to make sure we could dispose of it --

MS. O'DONOHOE: I was planning to raise it.

THE COURT: -- by some other method or something. So go ahead.

MR. PUTNAM: If I could have a brief recess, your Honor?

THE COURT: Sure. I'll allow you to amend it.

(Thereupon, at 10:21 a.m. a recess was taken until 11:28 a.m.)

THE COURT: Let the record show

that we're back on the record after the County Attorney requested a recess, the Court having ruled as a matter of law that the Winneshiek county Jail is not a detention facility.

MS. O'DONOHOE: It's 356 and 356A.

THE COURT: I'm looking at 719 here, yes, is not a detention facility envisioned by the legislature in enacting Section 719.8. Now, Mr. Putnam, do you wish to amend your trial information?

MR. PUTNAM: No, you Honor.

THE COURT: All right. Now, does the defendant at this time wish to proceed in any way?

MS. O'DONOHOE: Yes, your Honor, the defendant wishes to offer a plea in this matter pursuant to Section 204.401, Subsection 3, and 204.410.

THE COURT: Very well, let me get

those charges specifically in mind, which would be possession of a controlled substance. Is that how we deal with the section that you said, 401?

MS. O'DONOHOE: 204.401, your Honor, involves possession with intent to deliver as well.

THE COURT: Yeah, what I am looking for, I'm trying to get the elements.

MS. O'DONOHOE: Okay. Then you need to look at 204.401, Subsection 3.

THE COURT: And I was also -- yeah, it would be the 2300 section I believe in the uniform instructions --

MS. O'DONOHOE: Okay.

THE COURT: -- are the ones that I was -- this would be possession with intent to deliver?

MS. O'DONOHOE: Right, under 204.401, Subsection 2.

THE COURT: 204.401, Subsection 2.

MS. O'DONOHOE: And you also need to look at Subsection 3 as it involves marijuana and Section 204.410. So the case -- the elements are defined in 204.401, Subsection 2, and then we wish to offer affirmative evidence that it was an accommodation under 204.410 and that --

THE COURT: I believe that goes to when we're talking penalty.

MS. O'DONOHOE: Right.

THE COURT: And that would be that this is less than one ounce.

MS. O'DONOHOE: That's right, your Honor, and then looking at the penalty you go back to Section 204.401, Subsection 3.

THE COURT: Okay. I believe this would be a serious misdemeanor.

MS. O'DONOHOE: Yes your Honor.

I'm in error. The subsection with the elements is 204.401, Subsection 1. I apologize, your Honor.

THE COURT: Yeah, okay.

MS. O'DONOHOE: And that sets forth the elements and then you need to look at 204.410 for the accommodation, and that refers you back to 204.401, Subsection 3.

THE COURT: For the penalty. Okay. I can follow through on that. And for the record is this pursuant to any negotiated plea?

MS. O'DONOHOE: No, your Honor, it's not.

MR PUTNAM: For the record, your Honor, in fact, the State of Iowa is resisting the Court allowing the plea and accepting the plea.

THE COURT: Can the State furnish the Court with any other section of the

code in this set of circumstances other than the one that is charged?

MR PUTNAM: No, your Honor, it is the State of Iowa's belief that this is a proper charge and the section is controlling.

THE COURT: All right. No other section applies?

MR. PUTNAM: Not to my knowledge, your Honor.

THE COURT: All right, fine, very well. I will next go into a colloquy with the defendant. And before I can accept your plea, Mr. Gulrud, is that correct, am I pronouncing that, correctly, "Gulrud."

THE DEFENDANT: "Gulrud", yes.

THE COURT: "Gulrud." I have to make certain that this is voluntarily, knowingly and intelligently made and supported by a factual basis. And so

I'm going to ask you some questions, You have previously waived your right to a trial by jury.

Now, if you were indigent the Court would appoint an attorney to represent you. There is a privilege against self-incrimination, which is probably the most important right that you are waving in this particular stage in these proceedings, inasmuch as you would not have to make any statement at all to me. But in the course of accepting your plea you're going to have to admit your guilt, you're going to have to tell me what you did, and so you see you will be very effectively waiving your privilege against self-incrimination.

And if you wished to discuss this further with your attorney I would give you an opportunity to do so, if you wished to discuss it further in

regard to this matter of your waiving your privilege against self-incrimination.

THE DEFENDANT: Yes, I would like to discuss it with my attorney.

THE COURT: Okay, Fine, I'll give you that opportunity.

(Discussion between counsel and defendant off the record.

MS. O'DONOHOE: Okay, your Honor.

THE COURT: All right, and you understand what you are doing by waiving your privilege against self-incrimination, Mr. Gulrud?

THE DEFENDANT: yes.

THE COURT: If we had a trial you'd have the right to confront these witnesses and the right to cross-examine them with the help of your attorney. You're presumed innocent of this charge you're pleading guilty to until it would

be proven in a court of law. And this presumption of innocence would be maintained throughout any proceedings until such time as a jury of 12 people unanimously would find you guilty.

The finding of guilty would have to be based upon evidence that would be admissible in a court of law and would satisfy each of those 12 jurors of your guilt beyond a reasonable doubt. And in the event that there were witnesses on your behalf who were reluctant to appear, you could use this power of the court to subpoena those witnesses.

Now, by your plea of guilty there is no trial and the matter stands the same as if there had been a trial and you had been found guilty of the charge of possession of a controlled substance with intent to deliver. Any questions at all in regard to that?

THE DEFENDANT: No.

THE COURT: Do you know what the maximum penalty is for this charge?

THE DEFENDANT: Yes.

THE COURT: And what is that?

THE DEFENDANT: I believe six months.

THE COURT: That is correct, or a fine of not more than one thousand dollars, or by both such find and imprisonment is the maximum penalty. The statute also provides that all or any part of the sentence imposed may be suspended and the person placed upon probation upon such terms and conditions as the Court may him impose, including the active participation by such person in a drug treatment rehabilitation or education program approved by the court is the full magnitude of the penalty provided by the legislature for this ,

particular offense.

Now, have there been any threats or promises made to you to induce you to plead guilty, Mr. Gulrud?

THE DEFENDANT: No.

THE COURT: Are you satisfied with the services of Ms. O'Donohoe?

THE DEFENDANT: Yes.

THE COURT: Do you need any additional time in which to consult with her?

THE DEFENDANT: No.

THE COURT: Now, what makes you think you're guilty of this charge? What happened? What did you do that makes you think your guilty of this possession of a controlled substance with intent to deliver.

THE DEFENDANT: Well, I did possess it. I had the intent but I never never furnished it to anybody.

THE COURT: And what did you have?

THE DEFENDANT: Just, well, under an ounce I guess you would call it.

THE COURT: I mean, you haven't told me the substance that you had. You said you had "it".

THE DEFENDANT: Marijuana.

THE COURT: You had some marijuana. And you had it with the intent to deliver it to somebody else? It wasn't carried through but it was with the intent to give it to somebody else?

THE DEFENDANT: Yes.

THE COURT: And it is my understand that there was less than an ounce, it that correct?

MR. PUTNAM: Your Honor, the State would stipulate that the amount of marijuana that the defendant brought in to the jail was less than one ounce; however, I don't -- I guess for the

record I don't want this stipulation to be deemed a waiver of or an acquiescence in the Court's accepting this plea.

THE COURT: Now, Ms. O'Donohoe, do you know of any reason why your client should not plead guilty to this charge?

MS. O'DONOHOE: No, your Honor, I do not.

THE COURT: Now, Mr. Gulrud, have you had any intoxicating beverages to drink today?

THE DEFENDANT: No.

THE COURT: And we've previously gone on the record preliminarily at the time that you waived your right to a jury trial, the fact that you are not presently under the care of a doctor or taking any medication, isn't that true?

THE DEFENDANT: Yes.

THE COURT: Very well, then I'll ask you how then do you plead to a

charge of possession of a controlled substance with intent to deliver, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: I accept you plea and find it to be voluntarily, knowingly and intelligently made and supported by a factual basis. I shall direct that a presentence investigation be conducted in this matter and I will arbitrarily at this time subject to it being changed at a later time set this down for sentencing. The Court day up here I believe is on a --

MS. O'DONOHOE: Tuesday.

MR. PUTNAM: Your Honor, it is also on a Friday because this is a serious misdemeanor that could be handled by an associate.

THE COURT: But I think I'm taking the plea and I think I should -- yeah,

right. So we can do it on a Friday.

MR. PUTNAM: Yes, it could be either Tuesday or Friday.

THE COURT: Friday might be easier for me to accommodate the schedule when I am on or it might be from the standpoint it might be easier for a Court Day for me to change with a judge to take the Court Day here in Decorah that day with another judge. Now, there has been some talk that maybe the district judges will handle the associates because --

MR. PUTNAM: I've heard that also, your Honor.

THE COURT: Pardon?

MR. PUTNAM: I've heard that also, but I haven't heard an effective date.

THE COURT: I haven't either. They don't know how soon. so maybe I'll just put it on a Tuesday with the possibility

of it being set on a Friday. Now, January 30 would be at least about six weeks and perhaps they could handle it within that time. If they can't they usually come back and let us know if they can't. So why don't I set the sentencing in this matter for January 30, 1990, at 10:00 o'clock. Now, what's the condition of the bond of this defendant at the present time? I mean is he incarcerated? Is he in jail?

MS. O'DONOHOE: No, he isn't. He has posted pond, is released on bond.

THE COURT: On bond, and how much has been the bond?

MS. O'DONOHOE: Five thousand dollars I believe, your Honor.

THE COURT: All right. So bond, we'll just continue -- we'll just continue that bond.

MS. O'DONOHOE: Okay. Thank you.

THE COURT: Now, this then completes the matter of taking the plea, and do you wish to make a further record, Mr. Putnam --

MR. PUTNAM: Yes, your honor.

THE COURT: -- in view of the Court's ruling as to one of the elements of 719.8 --

MR. PUTNAM: Yes, your Honor.

THE COURT: -- to which the Court adversely ruled?

MR. PUTNAM: Yes, your Honor, I would like just to present some very brief evidence by way of an offer of proof, and I would call Deputy Sheriff Floyd Ashbach to the Stand.

THE COURT: All right.

FLOYD ASHBACHER,

called as a witness by and on behalf of the plaintiff, having been first duly sworn by the Court, was examined and

testified as follows:

DIRECT EXAMINATION

BY MR. PUTNAM:

Q. Would you state your name, please.

A. Floyd Ashbacher.

Q. Would you spell your last name, please.

A. A-s-h-b-a-c-h-e-r

Q. And what is your occupation?

A. Chief Deputy, Winneshiek County Sheriff's Department.

Q. How long have you been serving in that capacity?

A. Approximately, 14 years.

Q. Is the Winneshiek County Jail a place to detain prisoners.

A. Yes, it is.

Q. And how many cells currently are there at the jail?

A. I believe there's eight beds.

Q. And do you currently have people detained, prisoners, or people awaiting sentencing detained at the Winneshiek County Jail?

A. Yes, we do.

Q. And is it true that you have had prisoners detained there up to one year at any one given time?

A. Yes.

Q. Do you know where the funding comes for the jail?

A. Through the budget which is prepared by our department and okayed by the board of supervisors which comes out of the tax base.

Q. So the board of supervisors determines to what areas the money goes they're going to allocate to the sheriff's department?

A. Yes.

Q. And do they also have a separate category for the jail, and the maintenance and care and running of the jail.

A. Yes, they do.

Q. And, in fact, has the board of supervisors -- or did they require or authorize the hiring just recently of matrons to run the jail and man the jail itself?

A. Yes, they did.

Q. Is it a fair statement that the board of supervisors exercises a tremendous control over the county jail?

A. Yes.

Q. Is there another facility in Winneshiek County that from time to time is used for the housing of inmates?

A. The county care facility.

Q. On what occasions is it used?

A. If we have someone sentenced

which has a medical problem which we feel cannot be -- that the party cannot be incarcerated in the county jail, provisions have been made to be sentenced to the county care facility.

Q. And is that something arranged for by the Winneshiek county Attorney with the local judges?

A. That's my understanding.

Q. That has not been anything formally or officially arranged for by the board of supervisors?

A. I have not seen anything.

Q. And on August 31, 1989, was the Wineshiek County Jail operating as a detention facility?

A. Yes.

Q. Were there -- how may prisoners or inmates were at the detention facility, the jail?

A. I don't recall specifically,

but I believe there was five.

Q. And the defendant was one of them?

A. Yes, he was.

MR. PUTNAM: I have no further questions. I have nothing further to present by way of an offer of proof from this witness, your Honor.

THE COURT: All right. Do you wish to add anything to it Ms. O'Donohoe

MS O'DONOHOE: Just one questions.

CROSS-EXAMINATION

BY MS. O'DONOHOE:

Q. Is it a county jail, the facility?

A. It's the Winneshiek County Jail.

MS. O'DONOHOE: Okay. I have no other questions.

BY THE COURT:

Q. I believe that's all the other

thing; that is, I guess what I was basing it on, that statutory interpretation is the fact that the board of supervisors has not created an entity known as a detention facility, that you still have your jail, is that correct?

A. That's correct.

Q. And you have nothing else in Winneshiek County known as a detention facility?

A. No.

MR. PUTNAM: If I could just follow up, your Honor.

REDIRECT EXAMINATION

BY MR. PUTNAM:

Q. The jail has been funded and supervised and is under the control of the Winneshiek County Board of Supervisors?

A. Yes.

MR. PUTNAM: I have nothing further.

THE COURT: Okay. This can be off the record. I think the sheriff is the one that runs the jail.

MR. ASHBACHER: Well, I'm talking budgetary.

MR. PUTNAM: Well, yes and no.

THE COURT: I mean, this is off the record.

(Discussion offer the record.)

MS. O'DONOHOE: I did have a couple questions.

THE COURT: We'll go back on the record then.

RECROSS-EXAMINATION

BY MS. O'DONOHOE

Q. Okay does the sheriff have charge and custody of prisoners in your jail?

A. Yes.

Q. Okay, and does your sheriff -- does the sheriff keep a calendar indicating the names of the peoples under his charge in the jail in Winneshiek County?

A. Yes, we do.

MS. O'DONOHOE: I don't have any more questions.

THE COURT: Very well, you may step down and thank you, and this then concludes the proceedings and thank you very much.

MR. PUTNAM: Thank you.

MR. PUTNAM: Your Honor, could I just very briefly make just a little the additional record?

THE COURT: Certainly.

MR. PUTNAM: I know we had some discussion off the record.

THE COURT: Certainly.

MR. PUTNAM: Again, your Honor, I'm

addressing the issue of whether Section 356A.1 and Section 356 would stand for the proposition that a jail is not a detention facility, and I believe I've previously drawn the Court's attention to 356, the first two paragraphs. I would also note that in the that Section 719.7, a different code section, provides that it's a felony if alcohol is introduced to a detention facility. 719.8 provides it's a felony if a controlled substance is introduced.

And I believe it was not the legislature's intent to provide that the introduction of alcohol or a controlled substance to a facility similar in Winneshiek County to the care facility would be a felony where there are no restraints on movement coming and going, et cetera, but it would not be a felony to bring in a controlled substance or

alcohol to the Winneshiek County Jail. And I believe that in addition to the clear reading under 356 indicating that a jail is a detention facility, I would offer to support the position that the charge is a valid charge and again urge the Court to proceed with the trial on the charge as originally filed.

And, again, for the record I do resist the Court accepting the proposed plea and, in fact, accepting the plea on the charge of possession with intent to deliver.

THE COURT: Yeah, okay, fine. Thank you very much. I think that is -- I think the record is adequate there as to the fact that the Court felt that one of the elements of 719.8 would be to prove that the place of confinement was either a detention facility a correctional institution, or an

institution under the management of the Iowa Department of Corrections, and that the Court felt that the legislation by design in particularizing these things in leaving out the word "jail" did not cover jails. Thank you.

Say, there is one other thing that I did neglect to advise the defendant, and that's -- I set the matter for hearing but the defendant has another right, and that's the right to file a Motion in Arrest of Judgement. And this motion has to be filed within 45 days of today's date but not less than five days prior to the date for sentencing, which has been set for the 30th of January. So the 45 days and the five days before the date for sentencing are going to be pretty close together and something to watch.

The purpose of this motion is to

point out to me in the event that I haven't properly advised you of all your rights, or if there has been something illegal in the proceedings this way the defendant has to raise these matters at that time in this manner; otherwise, he cannot raise them on an appeal, on a subsequent appeal. And I don't know whether that might give the County Attorney the right to file a motion in arrest of judgment. I don't know if the County Attorney has the same right as the defendant or not, but it would seem to be apropos. And this might be in view of the circumstances of this case not with the defendant there, but that the County Attorney is more interested in a motion in arrest of judgment than the defendant. But nevertheless it is my duty to advise you of the right. Thank you, again.

MS. O'DONOHOE: Thank you, your Honor.

(Thereupon, at 12:00 o'clock noon all proceedings in this matter were concluded.)

IN THE IOWA DISTRICT COURT FOR
WINNESHIEK COUNTY

STATE OF IOWA	)	Criminal No. C-2304
Plaintiff,	)	ORDER
vs.	)	
MICHAEL DEAN	)	
GULRUD	)	
Defendant,	)	

APPEARANCES: Dale Putnam for the Plaintiffs.
Judith O'Donohoe for the Defendant.

(Filed December 14, 1989)

Defendant's Plea of Guilty to Possession of a controlled substance with intent to deliver (less than 1 ounce) 204.401(1) is entered of record and IT IS ORDERED:

1. That counsel for Defendant submit his statement for his services to date forthwith.

2. That the County Attorney forthwith provide the District Department of Correctional Services with the names of Defendant's victims and the amount of restitution to which each is entitled.

3. That the District Department of Correctional Services prepare a pre-sentence investigation, including Defendant's proposed plan of restitution.

4. This matter is set for sentencing on the 30th day of January 1990 at 10:00 o'clock A.M.

Done and Ordered this 14th day of December, 1989.

BY THE COURT: s/ William G. Klotzbach
Judge, First Judicial
District of Iowa

APPENDIX "B"

IN THE SUPREME COURT OF IOWA

No. 374 / 90-36

Filed December 19, 1990

STATE OF IOWA,

Appellant,

vs.

IOWA DISTRICT COURT FOR WINNESHIEK COUNTY

Appellee.

(Filed December 19, 1990)

Certiorari to the Iowa District Court for Winneshiek County, William G. Klotzbach, Judge.

Original certiorari proceeding

challenging district court's determination that a county jail is not a "detention facility," and its action in accepting, despite the objection of the prosecutor, a plea of guilty to a charge not set forth in the trial information. **WRIT SUSTAINED.**

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and Dale Putnam, County Attorney, for appellant.

Judith O'Donohoe of Eggert, Erb, Ott, O'Donohoe & Frye, Charles City, for appellee.

Considered by Harris, P.J., and Schultz, Lavorato, Neuman, and Snell, JJ.

SNELL, J.

Appellant, State of Iowa, brought

this original certiorari action to challenge the district court's determination that a county jail does not constitute a "detention facility" within the meaning of Iowa Code section 719.8 (1989). The State also challenges the district court's action in accepting, despite the objections of the prosecutor, a plea of guilty to a charge not set forth in the trial information. We sustain the writ.

On September 1, 1989, a county attorney's trial information was filed charging defendant, Michael Dean Gulrud, with two counts of obstructing justice, a class "D" felony, in violation of Iowa Code section 719.8 (1989). Count I alleges that the defendant "did unlawfully and willfully furnish or knowingly make available a controlled substance to an inmate at a

detention facility" in violation of section 719.8. Count II of the trial information similarly alleges that defendant "did unlawfully and willfully introduce a controlled substance into the premises of the Winneshiek County Jail" in violation of section 719.8. Trial was set for December 14, 1989. Defendant waived his right to a trial by jury and the case proceeded to trial to the court.

During the bench trial, the district court ruled as a matter of law that a county jail does not constitute a "detention facility" within the meaning of section 719.8. The court determined that in light of this distinction, defendant could not be convicted of the crime charge under that section. Defendant then offered to plead guilty to a lesser-included offense of

possession with intent to deliver, also a class "D" felony, with the understanding that the offense was an accommodation offense as defined in Iowa Code section 204.410 (1989). Over the objection of the county attorney, the district court accepted this guilty plea. The State then filed a petition for writ of certiorari which was granted by this court. Sentencing is stayed pending the outcome of this certiorari action.

Appellee contends, by way of Iowa Rule of Civil Procedure 308, that our scope of review in a certiorari action is strictly limited to questions of jurisdiction or illegality. This is not the law. Iowa Rule of Appellate Procedure 304 also provides that:

> If any case is brought by appeal, certiorari, or discretionary review, and the appellate court is of the opinion that another of these remedies

> was the proper one, the case shall not be dismissed, but shall proceed as though the proper form of review had been sought. Any one of the foregoing remedies may under this rule be treated by the appellate court or the one it deems appropriate.

Reading these rules together, we recently held that while "[r]elief in certiorari is ordinarily limited to questions of jurisdiction or illegality and not for correcting errors at law . . . 'courts frequently consider defects and errors in the proceedings of the inferior tribunal which are not strictly of a jurisdictional nature.'" State v. Iowa Dist. Court, ____ N.W. 2d ___,____ (Iowa 1990) (citations omitted).

It is apparent from the record that the ruling of the district court hinges upon its view that a "detention facility," as that term is used in section 719.8, could not include a

"county jail" in light of Iowa Code chapter 356A (1989). Chapter 356A does not refer to section 719.8 (or vice versa), but does provide that:

> A county board of supervisors may, by majority vote, establish and maintain by lease, purchase, or contract with a public or private nonprofit agency or corporation, facilities where persons may be detained or confined pursuant to a court order as provided in section 356.1. The facilities may be in lieu of or in addition to the county jail. The board shall establish rules and regulations for the operation of each facility. A person detained or confined to such a facility shall be required to do all the cleaning, upkeep, maintenance, minor repairs, and anything else necessary to properly maintain, operate, and preserve the facility. The sheriff shall not have charge or custody of a person detained or confined in such facility or transferred thereto. Such facility need not contain cells, cell blocks, or bars, if it is not necessary for the protection of the public, as determined by the board.

Iowa Code section 356A.1 (1989). Since the legislature provided in section 356A.1 that "facilities where persons may be detained or confined . . . may be

in lieu of or in addition to the county jail," apparently the district court reasoned that the legislature must have intended "detention facility," as used in section 719.8, to exclude county jails. The State contends that the district court erred in this reasoning and argues that our legislature intended to prohibit the introduction of drugs into any facility in which persons have been detained or confined by legal process.

When interpreting statutes, we are guided by familiar principles of statutory construction.

> Of course, the polestar is legislative intent. Our goal then, is to ascertain that intent and, if possible, give it effect. To ascertain the legislative intent we must look to what the legislature said, rather than what it should or might have said. Words are given their ordinary meaning unless defined differently by the legislature or possess of a particular and appropriate meaning in law. However,

> we must avoid legislating in our own right and placing upon statutory language a strained, impractical or absurd construction.

Shaw v. Soo Line R.R. Co., ____N.W. 2d _____, _____ (Iowa 1990) (quoting Hearst Corp. v. Iowa Dep't of Revenue and Fin., 461 N.W.2d 295, 299-300 (Iowa 1990) (citations omitted)).

"Detention Facility," as used in section 719.8, is ambiguous. It does not appear in the criminal definitions, see Iowa Code ch. 702 (1989), the general definitions, see Iowa Code Section 4.1 (1989), or the entries of dictionaries. See, e.g., Webster's Ninth New Collegiate Dictionary (1986). Also, depending on the circumstances, its usage may be broad or narrow. See 60 AM. Jur. 2d Penal and Correctional Institutions Section 2, at 1129 (1987); 72 C.J.S. Prisons Section 1, at 414-15 (1987); cf. State v. Knipe, 349 N.W.2d

770, 771 (Iowa 1984) (prison work camp amounts to a "detention facility" or "penal institution" within the meaning of Iowa Code section 901.8). Compare People v. Braun, 523 N.Y.S.2d 289, 290, (App. Div. 1987) ("detention facility" includes
prison bus); and People v. Walter, 499 N.Y.S.2d 280, 281 (App. Div.), appeal denied, 494 N.E.2d 131 (S. Ct. 1986) ("detention facility" includes secured psychiatric center); and Sureeporn Roll v. State, 473 N.E.2d 161, 163 (Ind. App. 1985) ("penal facility" includes halfway house); and In re C.D.M., 370 N.W.2d 287, 289-90 (Wis. App. 1985) ("detention facility" includes state training schools, in part because children confined there referred to as "prisoners" under statute); and State v. Peters, 667 P.2d 136, 138 (Wash. App.

1983) ("detention facility" includes places within furlough program); and People v. Blank, 451 N.Y.S.2d 242, 243 (App. Div. 1982) ("detention facility" includes power plant next to correctional facility); and People v. Carter, 172 Cal. Rptr. 838, 839 (Cal. App. 1981) ("jail" includes block of temporary holding cells in sheriff's station); and State v. Pietraszewski, 283 N.W.2d 887, 890-91 (Minn. 1979) ("state institution" includes state security hospital); and State ex rel. Farruggio v. Nenna, 291 N.Y.S.2d 749, 750 (Sup. Ct. 1968) ("detention facility" includes house for detention of narcotics addicts); with Oxman v. United States, 148 F.2d 750, 752-53 (8th Cir.), Cert. denied., 325 U.S. 887 (1945) ("jail or other place of detention" excludes locked room in

marshall's office); and People v. Charland, 515 N.Y.S.2d 144, 145 (App. Div. 1987) ("detention facility" excludes village work site).

The precursor to section 719.8 prohibited the bringing of drugs into "any county jail, city jail, or other place where person may be committed or detained pursuant to law." Iowa Code Section 745.15 (1977). In 1976, when the new criminal code was adopted, the legislature elected to use the phrases "detention facility," "correctional institution," and "institution under the management of the Iowa department of corrections" in Iowa Code section 719.8. See 1976 Iowa Acts ch. 1245, Section 1908; Iowa Code Section 719.8 (1979).

Although the language has been changed, we presume the legislature did not intend a radical narrowing of

criminal liability in section 719.8 by electing to use these new phrases. See State v. Hauhauser, 272 N.W.2d 432, 434 (Iowa 1978); Emory v. Fenton, 266 N.W. 2d 6, 10 (Iowa 1978). See also 4 J. Yeager & R. Carlson Iowa Practices Section 131, at 35 (1979). In fact, the legislature's intent is most likely indicated through section 719.8 (as amended), by the stated purpose, "to maintain safety, security, order, and discipline" in all detention facilities, correctional institutions, and institutions under the management of the department of corrections. See Annotation, Conveying Contraband to Prisoner, 64 A.L.R. 4th 902, 909-10 (1988); accord State v. Jones, 298 N.W. 2d 296, 299 (Iowa 1980). Moreover, these statutes, sections 719.8 and 356A.1, pertain to different subject

matter and are not in pari materia.

We therefore conclude that the district court erred in its interpretation of section 719.8 in determining the phrase "detention facility" does not include county jails.

Based on its analysis that count I, which charged a violation in a detention facility, was legally defective, the district court proceeded to accept, over the objections of the county attorney, defendant's plea of guilty to the lesser-included offense of possession with intent to deliver, even though such charge was not set forth in the trial information. Cf. State v. Iowa Dist. Court, _____ N.W.2d at _____. This month we decided in State v. Iowa Dist. Court that the trial court is without authority to accept a guilty plea to a lesser-included offense over the

prosecutor's objection. Id. at ____. In so doing the court erred here.

Relying on State v. Dirkestrand, 239 N.W.2d 353, 363 (Iowa 1976) and Iowa Code section 816.3(3) (1989), defendant argues that by accepting his plea of guilty to the lesser-included offense of possession with intent to deliver, a charge not set forth in the trial information, the court is now barred from any further prosecution for a higher degree offense. Although we have no disagreement with the general principles espoused in the authorities cited by defendant, we do disagree with their applicability in this action.

The prohibition against prosecution after the vacation of a guilty plea presumes the existence of a valid guilty plea in the first place. See 4 Wharton's Criminal Evidence Section 672,

at 296-99 (1987); 21 Am. Jur. 2d Criminal Law Section 256, at 452, Section 258, at 454, Section 270, at 475, Section 271, at 476 (1981); Annotation, Retrial for Greater Offense, 14 A.L.R. 4th 970, 975-76 (1982).

In the present action, not only was the guilty plea invalid, but the county attorney took no part in, and in fact resisted, the guilty plea proceedings initiated by the defendant. Moreover, defendant's consent and participation in those proceedings amounted to a constructive waiver of his double jeopardy protection.

In our case of State v. Bartlett, 181 Iowa 436, 438-39, 164 N.W. 757, 758 (1917), this court stated that:

> The law has long been settled that if one procures himself to be prosecuted for an offense in order to get off with slight punishment, and thereby

> bar a prosecution in good faith by the state for the same offense, and such prosecution is really by himself either directly or indirectly through the agency of another and the state, though a party to the proceedings in name, is not so in fact, and has no actual agency in the matter, the judgment entered is void, and affords the accused no protection. While the ground for so holding is usually stated to be the fraud practiced by the accused, a better reason for such decisions is that the state has never become a party to the action. The state can no more be bound by a judgment to which it is not a party than can a citizens of the state.

(Citations omitted.)

We find the proceedings of the district court to be void, jeopardy does not attach and the State is free to prosecute the accused for the higher degree of offense if it so chooses.

WRIT SUSTAINED.

APPENDIX "C"

IN THE SUPREME COURT OF IOWA

NO. 90-36

ORDER

STATE OF IOWA,

Appellant,

vs.

IOWA DISTRICT COURT FOR WINNESHIEK COUNTY

Appellee.

(Filed January 24, 1991)

After consideration by the court, en banc, appellant's Limited Motion to Strike in the above-captioned matter is hereby sustained.

Appellee's Petition for Rehearing in this case is overruled and denied.

Done this 24th day of January, 1991,

THE SUPREME COURT OF IOWA
s/ Arthur A. McGiverin
Chief Justice